



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
National Human Resources Management Center
Denver Federal Center, Building 50
Denver, CO 80225-0047

IN REPLY TO:

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August 24, 2001

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To: All BC, HR, NI, and ST Employees

From: Director, National Human Resources Management Center

Subject: Testimony of Employees and Production of Records in Litigation

Department employees are frequently requested or subpoenaed to provide testimony or produce records in litigation. These types of requests are referred to as *Touhy* (pronounced "Too-ee") requests. Attached is Title 43 of the Code of Federal Regulations (CFR), Part 2, Subpart E - *Legal Process: Testimony by Employees and Production of Records*. This regulation provides that Department employees may not appear as witnesses concerning information acquired in the course of performing official duties or because of their official status, or to produce Department records in litigation either voluntarily or in response to a subpoena, without the consent of the Department.

REGULATORY EFFECTS:

The intended effect of this regulation is to conserve the ability of the Department to conduct official business, preserve its' employee resources, minimize involvement in matters unrelated to its' mission and programs, preserve its' impartiality, avoid spending public time and money for private purposes, and to help avoid needless litigation.

APPLICATION EXCEPTIONS:

This regulation **does not** apply to Congressional inquiries; Federal court civil proceedings in which the United States is a party; criminal cases before Federal, State and Tribal courts where BLM employees and records are involved; or Freedom of Information Act and Privacy Act requests. However, it is important to note that a subpoena for records may require processing under either the Freedom of Information Act or the Privacy Act if the records being requested are protected from release by either of these Acts.

EMPLOYEE RESPONSIBILITIES:

If you receive a *Touhy* request or subpoena to appear as a witness or produce Department records in litigation, **immediately notify your supervisor**. In addition, **immediately notify, or have your supervisor notify** Michelle Trast, Records Administrator, at (303) 236-6362.

Signed by:
Linda D. Sedbrook
Director
NHRMC

Authenticated by:
Luron Porter
Staff Assistant

1 Attachment

1 - Title 43 CFR Part 2, Subpart E - *Legal Process: Testimony by Employees and Production of Records* (7pp)

Distribution

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[Code of Federal Regulations]
[Title 43, Volume 1, Parts 1 to 999]
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TITLE 43--PUBLIC LANDS: INTERIOR

PART 2--RECORDS AND TESTIMONY; FREEDOM OF INFORMATION ACT--Table of Contents

Subpart E--Legal Process: Testimony by Employees and Production of Records

Source: 65 FR 46369, July 28, 2000, unless otherwise noted.

General Information

Sec. 2.80 What does this **subpart** cover?

(a) This **subpart** describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

(1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;

(2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;

(3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;

(4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this **subpart**, ``employee'' means a current or former Department employee, including a contract or special government employee.

(c) This **subpart** does not apply to:

(1) Congressional requests or subpoenas for testimony or records;

(2) Federal court civil proceedings in which the United States is a party;

(3) Federal administrative proceedings;

(4) Federal, State and Tribal criminal court proceedings;

(5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. See 5 CFR Secs. 2635.702(b), 2635.807 (b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by Sec. 2.90.

(d) This **subpart** does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR Part 2, subparts B and D.

(e) Nothing in this **subpart** is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This **subpart** only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

Sec. 2.81 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by Sec. 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this **subpart**. The Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this **subpart** applies unless authorized by the Department under Secs. 2.80 through 2.90 United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

Responsibilities of Requesters

Sec. 2.82 How can I obtain employee testimony or Department records?

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a ``Touhy Request;' ' see Sec. 2.84 and United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with Sec. 2.85, if your Touhy Request is granted.

(b) To obtain official Department records, you must submit:

(1) A Touhy Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR Part 2, appendix A, if your Touhy Request is granted.

(c) You must send your Touhy Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your Touhy Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR Part 2, Appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

Sec. 2.83 If I serve a subpoena duces tecum, must I also submit a Touhy request?

Yes. If you serve a subpoena for employee testimony, you also must submit a request under United States ex rel. Touhy v. Regan, 340 U.S. 462 (1951)? If you serve a subpoena duces tecum for records in the possession of the Department, you also must submit a Touhy Request.
Sec. 2.84 What information must I put in my Touhy Request?

Your Touhy Request must:

- (a) Identify the employee or record;
 - (b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
 - (c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;
 - (d) Show that the desired testimony or records are not reasonably available from any other source;
 - (e) Show that no record could be provided and used in lieu of employee testimony;
 - (f) Provide the substance of the testimony expected of the employee; and
 - (g) Explain why you believe your Touhy Request complies with
- Sec. 2.88.

Sec. 2.85 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production under 43 CFR Part 2, Appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

Sec. 2.86 Can I get an authenticated copy of a Department record?

Yes. We may provide an authenticated copy of a Department record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under Sec. 2.13 or this **Subpart**.

Responsibility of the Department

Sec. 2.87 How will the Department process my Touhy Request?

(a) The appropriate Department official will decide whether to grant or deny your Touhy Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your Touhy Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your Touhy Request.

(c) If you fail to follow the requirements of this **Subpart**, we will not allow the testimony or produce the records.

(d) If your Touhy Request is complete, we will consider the request under Sec. 2.88.

Sec. 2.88 What criteria will the Department consider in responding to my Touhy Request?

In deciding whether to grant your Touhy Request, the appropriate Department official will consider:

- (a) Your ability to obtain the testimony or records from another source;
- (b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and
- (c) Our ability to:
 - (1) Conduct our official business unimpeded;
 - (2) Maintain impartiality in conducting our business;
 - (3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;
 - (4) Avoid spending public employee's time for private purposes;
 - (5) Avoid the negative cumulative effect of granting similar requests;
 - (6) Ensure that privileged or protected matters remain confidential; and
 - (7) Avoid undue burden on us.

Responsibilities of Employees

Sec. 2.89 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a Touhy Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a Touhy Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the Touhy Request under Sec. 2.88.

(c) All decisions granting or denying a Touhy Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

- (1) Consult your delegated authority to determine if you can grant a request for authentication of records; and
- (2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

Sec. 2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest. This procedure means:

- (1) You must obtain the written approval of your Deputy Ethics Official;
- (2) You must be in an approved leave status if you testify during duty hours; and
- (3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Department.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802 and 5 CFR 3501.105.

Appendix A to Part 2--Fees

The following uniform fee schedule is applicable to all constituent units of the Department. It states the fees to be charged to members of the public for services performed in searching for, reviewing and duplicating requested records in connection with FOIA requests made under **subpart** B of this part and to services performed in making documents available for inspection and copying under **subpart** A of this part. The duplicating fees stated in the schedule are also applicable to duplicating of records in response to requests made under the Privacy Act. The schedule also states the fee to be charged for certification of documents.

(1) Copies, basic fee. For copies of documents reproduced on a standard office copying machine in sizes to 8 1/2" x 14", the charge will be \$0.13 per page.

Examples: For one copy of a three-page document, the fee would be \$0.39. For two copies of a three-page document, the fee would be \$0.78. For one copy of a 60-page document, the fee would be \$7.80.

(2) Copies, documents requiring special handling. For copies of documents which require special handling because of their age, size, etc., cost will be based on direct costs of reproducing the materials.

(3)-(4) [Reserved]

(5) Searches. For each quarter hour, or portion thereof, spent by clerical personnel in manual searches to locate requested records: \$2.30. For each quarter hour, or portion thereof, spent by professional or managerial personnel in manual searches to locate requested records because the search cannot be performed by clerical personnel: \$4.65.

Search time for which fees may be charged includes all time spent looking for material that is responsive to a request, including line-by-line or page-by-page search to determine whether a record is responsive, even if the search fails to locate records or the records located are determined to be exempt from disclosure. Searches will be conducted in the most efficient and least expensive manner, so as to minimize costs for both the agency and the requester. Line-by-line or page-by-page identification should not be necessary if it is clear on the face of a document that it is covered by a request.

(6) Review of records. For each quarter hour, or portion thereof, spent by clerical personnel in reviewing records: \$2.30. For each quarter hour, or portion thereof, spent by professional or managerial personnel in reviewing records: \$4.65.

Review is the examination of documents located in response to a commercial use request to determine whether any portion of any document located is permitted to be withheld and the subsequent processing of documents for disclosure by excising exempt material or otherwise preparing them for release. Review does not include time spent in resolving general legal or policy issues regarding the application of exemptions.

(7) [Reserved]

(8) Certification. For each certificate of verification attached to authenticated copies of records furnished to the public the charge will be \$0.25.

(9) [Reserved]

(10) Computerized records. Charges for services in processing requests for records maintained in computerized form will be calculated in accordance with the following criteria:

(a) Costs for processing a data request will be calculated using the same standard direct costs charged to other users of the facility, and/or as specified in the user's manual or handbook published by the computer center in which the work will be performed.

(b) An itemized listing of operations required to process the job will be prepared (i.e., time for central processing unit, input/output, remote terminal, storage, plotters, printing, tape/disc mounting, etc.) with related associated costs applicable to each operation.

(c) Material costs (i.e., paper, disks, tape, etc.) will be calculated using the latest acquisition price paid by the facility.

(d) ADP facility managers must assure that all cost estimates are accurate, and if challenged, be prepared to substantiate that the rates are not higher than those charged to other users of the facility for similar work. Upon request, itemized listings of operations and associated costs for processing the job may be furnished to members of the public.

(e) Requesters entitled to two hours of free search time under 43 CFR 2.20(e) shall not be charged for that portion of a computer search that equals two hours of the salary of the operator performing the search.

(11) Postage/mailing costs. Mailing charges may be added for services (such as express mail) that exceed the cost of first class postage.

(12)-(13) [Reserved]

(14) Other services. When a response to a request requires services or materials other than those described in this schedule, the direct cost of such services or materials to the Government may be charged, but only if the requester has been notified of such cost before it is incurred.

(15) Effective date. This schedule applies to all requests made under the Freedom of Information Act and Privacy Act after December 30, 1987.

[52 FR 45592, Nov. 30, 1987]

Appendix B to Part 2--Bureaus and Offices of the Department of the Interior

1. Bureaus and Offices of the Department of the Interior. (The address for all bureaus and offices, unless otherwise indicated, is U.S. Department of the Interior, Washington, DC 20240.)

Secretary of the Interior, Office of the Secretary
Office of Administrative Services (for Office of the Secretary components)

Assistant Secretary, Territorial and International Affairs

Commissioner, Bureau of Indian Affairs

Director, U.S. Fish and Wildlife Service

Director, National Park Service, P.O. Box 37127, Washington, DC, 20013-7127

Commissioner, Bureau of Reclamation

Director, Bureau of Land Management

Director, Minerals Management Service

Director, Bureau of Mines, Columbia Plaza, 2401 E Street NW., Washington, DC 20241

Director, Geological Survey, The National Center, Reston, VA 22092

Director, Office of Surface Mining Reclamation and Enforcement

Director, Office of Hearings and Appeals, 4015 Wilson Blvd., Arlington, VA 22203

Inspector General, Office of Inspector General

Solicitor, Office of the Solicitor

2. Freedom of Information Officers of the Department of the Interior. (The address for all Freedom of Information Officers, unless otherwise indicated, is U.S. Department of the Interior, Washington, DC 20240.)

Director, Office of Administrative Services (for Office of the Secretary components), U.S. Department of the Interior
Director, Office of Administration, Bureau of Indian Affairs
Freedom of Information Act Officer, Bureau of Land Management
Assistant Director, Finance and Management, Bureau of Mines, Columbia Plaza, 2401 E Street NW., Washington, DC 20241
Freedom of Information Act Officer, Bureau of Reclamation
Chief, Division of Media Information, National Park Service
Chief, Regulatory Development and Issues Management, Office of Surface Mining Reclamation and Enforcement
Chief, Directives Management Branch, Policy and Directives Management, U.S. Fish and Wildlife Service,
Chief, Paperwork Management Unit, U.S. Geological Survey, The National Center, Reston, VA 22092
Freedom of Information Act Officer, Minerals Management Service, 12203 Sunrise Valley Drive, Reston, VA 22091
Information Officer, Office of Inspector General

3. Office of Hearings and Appeals--Field Offices:

Administrative Law Judge, 710 Locust St., Federal Building, Suite 116, Knoxville, TN 37902
Administrative Law Judges, 6432 Federal Bldg., Salt Lake City, UT 84138
Administrative Law Judge, 2901 N. Central Ave., Suite 955, Phoenix, AZ 85012-2739
Administrative Law Judge, 2020 Hurley Way, Suite 150, Sacramento, CA 95825
Administrative Law Judges, Bishop Henry Whipple Federal Building, 1 Federal Drive, rooms 674 and 688, Fort Snelling, MN 55111
Administrative Law Judge, 1700 Louisiana N.E., Suite 220, Albuquerque, NM 87110
Administrative Law Judge, 215 Dean A. McGee Ave., room 507, Oklahoma City, OK 73102
Administrative Law Judge (Indian Probate), Federal Bldg. & Courthouse, 515 9th St., Suite 201, Rapid City, SD 57701
Administrative Law Judge (Indian Probate), Federal Bldg. & Courthouse, Rm. 3329, 316 N. 26th St., Billings, MT 59101

4. Office of the Solicitor-- Field Offices.

Regional Solicitors

Regional Solicitor, U.S. Department of the Interior, 701 C Street, Anchorage, AK 99513
Regional Solicitor, U.S. Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, CA 95825
Regional Solicitor, U.S. Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, CO 80225
Regional Solicitor, U.S. Department of the Interior, Richard B. Russell Federal Building, 75 Spring Street, SW., Suite 1328, Atlanta, GA 30303
Regional Solicitor, U.S. Department of the Interior, Suite 612, One Gateway Center, Newton Corner, MA 02158
Regional Solicitor, U.S. Department of the Interior, Room 3068, Page Belcher Federal Building, 333 West 4th Street, Tulsa, OK 74103
Regional Solicitor, U.S. Department of the Interior, Lloyd 500 Building, Suite 607, 500 N.E. Multnomah, Portland, OR 97232
Regional Solicitor, U.S. Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, UT 84138

Field Solicitors

Field Solicitor, U.S. Department of the Interior, Suite 150, 505 North Second St., Phoenix, AZ 85004

Field Solicitor, U.S. Department of the Interior, P.O. Box M, Window Rock, AZ 86515

Field Solicitor, U.S. Department of the Interior, Box 36064, 450 Golden Gate Avenue, Room 14126, San Francisco, CA 94102

Field Solicitor, U.S. Department of the Interior, Box 020, Federal Building, U.S. Courthouse, 550 West Fort Street, Boise, ID 83724

Field Solicitor, U.S. Department of the Interior, 686 Federal Building, Twin Cities, MN 55111

Field Solicitor, U.S. Department of the Interior, Room 5431, Federal Building, 316 N. 26th Street, Billings, MT 59101

Field Solicitor, U.S. Department of the Interior, P.O. Box 1042, Santa Fe, NM 87504

Field Solicitor, U.S. Department of the Interior, Osage Agency, Grandview Avenue, Pawhuska, OK 74056

Field Solicitor, U.S. Department of the Interior, Suite 502J, U.S. Post Office and Courthouse, Pittsburgh, PA 15219

Field Solicitor, U.S. Department of the Interior, P.O. Box 15006, Knoxville, TN 37901

Field Solicitor, U.S. Department of the Interior, 1100 South Fillmore, Amarillo, TX 79101

Field Solicitor, U.S. Department of the Interior, 603 Morris Street, 2nd Floor, Charleston, WV 25301.

[52 FR 45593, Nov. 30, 1987, as amended at 53 FR 16128, May 5, 1988; 58 FR 48973, Sept. 21, 1993]